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**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Wednesday *the* 25th *day of* October, 2006.

Lasting Beauty, L.L.C., et al., Appellants,

against Record No. 061586
Circuit Court No. CH04-626

City of Chesapeake, et al., Appellees.

[Entered: October 25, 2006]

From the Circuit Court of the City of Chesapeake

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/
Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

THE CITY OF CHESAPEAKE,
A Municipal Corporation, and
JAMES T. DAVIS, CZA, Zoning
Administrator,

Plaintiffs

v. Chancery No. 04-626

LASTING BEAUTY, L.L.C., and
DENISE HUMPHRIES,

Defendants

**MEMORANDUM OPINION**

On June 21, 2004, the City of Chesapeake ("the City") and James T. Davis, Zoning Administrator ("Davis") (collectively "plaintiffs") filed a Bill of Complaint seeking declaratory judgment and a permanent injunction against Lasting Beauty, L.L.C. ("Lasting Beauty") and Denise Humphries ("Humphries") (collectively "defendants") for their alleged violation of section 7-602 of the Chesapeake Zoning Ordinance.

On June 24, 2004, the defendants filed a demurrer and answer and cross-bill, which alleged that the zoning scheme relevant to tattoo parlors and permanent makeup establishments be declared invalid. Defendants also filed a Bill of Particulars, which alleged that Chesapeake's zoning scheme relating to tattooing/intradermal micropigmentation (1) violates the Dillon Rule; (2) is not rationally related to a proper government

purpose and fails to meet the "fairly debatable" standard; (3) unconstitutionally burdens free speech and expression rights guaranteed by the United States and Virginia Constitutions; (4) denies equal protection and due process rights guaranteed by the United States and Virginia Constitutions; and (5) constitutes an illegal attempt by the plaintiffs to avoid the impact of a prior final order of this tribunal striking down the former ban on tattooing.[1]

The plaintiffs filed a motion to strike the defendants' answer and cross-bill. By an agreed Order, dated May 12, 2005, both the defendants' and plaintiffs' demurrers were overruled. At trial, the parties stipulated that Lasting Beauty operated in a B-2 zoning district and practiced intradermal micropigmentation, which constituted tattooing under the relevant zoning ordinance. The parties agreed that the burden shifted to the defendants, and they proceeded with their case. At the end of the defendants' case, the plaintiffs moved to strike the evidence. The Court took the motion under advisement.

## FINDINGS OF FACT

The evidence at trial established the following. Humphries operates a business, Lasting Beauty, located at 445 Battlefield Boulevard, Suite Q,

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[1] Lasting Beauty filed an appeal from a decision of the Chesapeake Board of Zoning Appeals denying Lasting Beauty's appeal of the violation letter issued to it on May 21,2003. By Consent Order, dated May 5, 2005, this Court dismissed Lasting Beauty's appeal (CH04-26), but reserved to Lasting Beauty the right to raise and pursue all claims and arguments therein presented in this case.

Chesapeake, Virginia 23320, that specializes in the application of permanent makeup, also known as micropigmentation. Lasting Beauty is located within a B-2 zoning district. Section 7-602 of the Chesapeake Zoning Ordinance does not permit the operation of a tattoo parlor in the B-2 zoning district. Section 3-403 of the Chesapeake Zoning Ordinance defines tattoo parlor to include permanent makeup services.

On June 20, 2001, the City Council enacted an ordinance, which amended section 8-602 of the Chesapeake Zoning Ordinance, permitting tattoo parlors, including permanent makeup establishments, to operate in the M-l and M-2 ("industrial") districts within the City of Chesapeake. The Council did so in response to discovering that the previous ban on tattoo parlors within the City of Chesapeake was not legal. The evidence established that at the meeting on the proposed ordinance, most of the City Council members expressed opinions that tattoo parlors should be banned. Additionally, Council members were not presented with any evidence on the safety concerns of tattooing when they decided to enact the ordinance allowing the parlors to operate only in industrial districts.

Evidence at trial established that since the relevant ordinance concerning tattoo parlors was enacted, at least one conditional use permit has been granted to a tattoo parlor named Wally's American Pie Tattoo Company. Additionally, another business named Holly's Hair Nails and More, operates in a B-2 district within the City of

Chesapeake that applies permanent makeup. Although known to the City, the City has not sought to bring an action against her such as it has with defendants.

Evidence established that the clientele of Lasting Beauty consists of women, generally 45 to 80 years of age, who have an average annual income of $50,000 or more. Additionally, defendants presented evidence that individuals who receive tattoos today differ from the perception of past recipients and involve a greater diversity of individuals. Finally, the evidence established that there are 501.97 acres in the Greenbrier area alone, and over 3,500 acres in the entire City, that are zoned consistent with defendants' requested use.

## ANALYSIS

Defendants' first argument is that the zoning scheme is invalid because it violates the Dillon Rule. This is so, defendants argue, because the City has not been given the authority to ban the operation of tattoo parlors. Defendants rely on this Court's June 5, 2001 ruling that section 15.2-912 does not permit localities to completely ban tattoo parlors. Defendants contend that the current zoning scheme acts as a *de facto* ban of tattoo parlors within the City, exceeding the authority granted to the City by § 15.2-912. In response, the plaintiffs argue that the City's authority to zone tattoo parlors is granted in Code §§ 2280 - 2286, and the zoning ordinance at issue was not enacted pursuant to Code § 15.2-912.

The Dillon Rule provides that "municipal governments have only those powers which are

expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable." *City of Virginia Beach* v. *Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999) (*citing Commonwealth* v. *County Board of Arlington County*, 217 Va. 558, 574, 232 S.E.2d s30, 40 (1977)). The General Assembly has granted authority to localities to enact zoning regulations. VA. CODE ANN. §§ 15.2-2280 - 2286. Additionally, localities possess the authority to "regulate the sanitary condition of the personnel, equipment and premises of tattoo parlors . . .." VA. CODE ANN. § 15.2-912. On June 5, 2001, however, this Court ruled that Code § 15.2-912 does not give localities the authority to ban tattoo parlors. (Exhibit D-5.)

The operation of tattoo parlors, for conditional use, is permitted in Chesapeake within those districts zoned industrial. Chesapeake Zoning Ordinance, § 8-602. The evidence at trial was that over 3,500 acres of land is zoned consistent with defendants' requested use. The Greenbrier area of Chesapeake alone contains 501.97 acres so zoned. At trial, Humphries admitted that the Greenbrier area, with the traffic that other businesses bring, could be good for business. Additionally, on June 16, 2002, the Council approved a conditional use permit for a tattoo parlor to operate within the City. Accordingly, the evidence does not support the defendants' claim that the current zoning scheme constitutes a *de facto* ban on tattoo parlors within

the City of Chesapeake.[2] Finally, the defendants have not argued that the City has exceeded its authority under Code §§ 15.2-2280 - 2286. Therefore, the Court finds that the current zoning scheme regarding tattoo parlors does not violate the Dillon Rule.

Defendants' next argument is that the subject zoning restrictions, facially and/or as applied, unconstitutionally burden free speech and expression rights guaranteed by the United States and Virginia Constitutions. Defendants maintain that tattooing is an art form entitled to the protections of the First Amendment to the United States Constitution, as well as similar protections from the Virginia Constitution. Defendants argue that the City must prove that there are "no less restrictive ways to accomplish any legitimate goals or purposes the City is able to articulate." Defendants' Bill of Particulars, ^ | 2.

Under the United States Supreme Court's First Amendment analysis, conduct constitutes protected speech if it is "sufficiently imbued with elements of communication." *Spence v. Washington,* 418 U.S. 405, 409 (1974). The question, then, is whether the act of applying permanent makeup, or tattoos, is sufficiently communicative such that it falls within the protection of the First and Fourteenth

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[2] This conclusion also dispenses with the defendants' claim that the zoning scheme was enacted in an attempt to avoid the impact of this Court's order striking down the former ban on tattoo parlors.

Amendments. *See Yurkew* v. *Sinclair*, 495 F. Supp. 1248, 1254 (D. Minn. 1980).

Neither the United States Supreme Court, nor the Supreme Court of Virginia has addressed this issue. Of the few courts that have, the majority of them have concluded that the act of tattooing cannot be considered speech under the First Amendment. *See State* v. *White*, 560 S.E.2d 420, 423, 348 S.C. 532, 537 (2002) (holding the appellant had not made any showing that the process of tattooing is communicative enough to automatically fall within First Amendment protection); *Yurkew*, 495 F. Supp, at 1253 (concluding that the process of tattooing was not protected speech under the First Amendment); *State ex rel. Medical Licensing Bd. v. Brady*, 492 N.E.2d 34 (Ind. Ct. App. 1986) (same); *People* v. *O'Sullivan*, 96 Misc. 2d 52, 53 (N.Y. Misc. 1978) (same). Moreover, the United States Court of Appeals for the Eighth Circuit has held that when a tattoo is intended only as a form of self-expression, not intending to convey a particularized message, it is not protected speech under the First Amendment. *Stephenson v. Davenport*, 110 F.3d 1303, 1307, n.4 (8th Cir. 1997).

Defendants direct the Court's attention to one unpublished opinion by the Superior Court of Suffolk County, Massachusetts, which concluded that the act of tattooing was expression protected by the First Amendment of the United States Constitution. *Lanphear* v. *Commonwealth of Massachusetts*, Mass. Superior Court Slip Opinion 99-1896-B (October 20, 2000), aff'd *Commonwealth* v. *Lanphear*, 50 Mass. App. Ct. 1107, 737 N.E.2d

1281 (2000). The Massachusetts court did not find *Yurkew* and *Stephenson* persuasive, concluding that those cases simply decided, without analysis, that tattooing did not constitute conduct protected under the First Amendment. *See id.*

This court has the benefit of the analysis conducted by the Supreme Court of South Carolina, however, which the Massachusetts court did not have when it decided *Lanphear.* The South Carolina Court recognized that a general presumption of validity attaches to legislative acts when subjected to a constitutional attack. *White*, 560 S.E.2d at 422, 348 S.C. at 536. Virginia precedent establishes the same presumption. *Wilkins* v. *West*, 264 Va. 447, 462, 571 S.E.2d 100, 108 (2002). Unless the legislation is clearly shown to violate a constitutional provision, it will be upheld. *Id.* Accordingly, defendants have the burden of showing that the instant zoning scheme clearly violates a constitutional provision.

The only evidence offered by defendants attempting to show that the zoning scheme violated the provisions of the First Amendment was Humphries' testimony that she considers a tattoo a form of expression and considers herself an artist. Defendant's subjective belief, however, is not sufficient to overcome the presumption of validity. Defendants were required to show how the act of tattooing or applying permanent makeup is intended to convey a particularized message and whether there is likelihood that the message would be understood by those who viewed it. *See White*, 560 S.E.2d at 423, 348 S.C. at 537 (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). Here, as in

*White*, the defendants have not shown how the act of injecting dye to create the tattoo, or permanent makeup, is sufficiently communicative in nature to warrant protection under the First Amendment.

Defendants also argue, however, that the zoning scheme, relative to tattoo parlors and permanent makeup establishments, is not even rationally related to a proper governmental purpose, and therefore fails to meet the 'fairly debatable' standard. Defendants' Bill of Particulars, ¶ 1. Both in their pleadings and at trial, the defendants argued that because they had challenged the reasoning behind and authority for the subject zoning scheme, it was incumbent upon the City to come forward with evidence to support the need and basis for the regulations.

Defendants' attempt to place the burden on the City to prove that the zoning scheme is rationally related to a legitimate government interest is in error. The standard for judicial review of the validity of zoning ordinances is well settled. *Board of County Supervisors* v. *The Southland Corporation*, 224 Va. 514, 522, 297 S.E.2d 718, 722 (1982). The action of a local governing body in "enacting or amending its zoning ordinance is presumed to be valid." *Id.* Where a party challenges the presumptive reasonableness of a zoning ordinance with "probative evidence of unreasonableness, the ordinance cannot be sustained unless the governing body meets the challenge with some evidence of reasonableness." *Id.* If the governing body supplies evidence of reasonableness "sufficient to make the question 'fairly debatable,' the ordinance must be

sustained." *Id.* at 522-23, 297 S.E.2d at 722 (citing *Fairfax County* v. *Snell Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974) and *Board of Supervisors* v. *Carper*, 200 Va. 653, 107 S.E.2d 390 (1959)).

Defendants presented evidence, in the form of testimony from a former City Council member, that at the time the provisions of the zoning scheme regarding tattoo parlors were enacted, a number of the Council members expressed opinions showing bias against tattoo parlors and that the Council members did not think they should be allowed at all in the City. The former Council member also testified that in his opinion, the decision not to allow tattoo parlors in retail areas was politically motivated. He further testified that there was no evidence or information presented to the Council that tattoos are unsafe.

This evidence, however, falls short of probative evidence of unreasonableness. First, in considering whether a legislative act is reasonable, generally the motives of the governing body in undertaking the act are immaterial. *Helmick v. Town of Warrenton*, 254 Va. 225, 231, 492 S.E.2d 113 (1997). Accordingly, whether the Council members thought that tattoo parlors should be allowed in the City is immaterial, particularly in light of the Court's ruling above that the extant zoning scheme is not a *de facto* ban of tattoo parlors within the City. Secondly, merely because the Council did not receive information that tattoos are unsafe is not relevant to whether permitting tattoo parlors to operate only in industrial districts is unreasonable.

At most, defendant Humphries presented her own testimony that she desired to operate her business in its present location, along with her opinion that the zoning scheme was unreasonable. Although the City did not supply any evidence of reasonableness at trial, the burden rested on the defendants to supply probative evidence of unreasonableness. The defendants simply did not meet their burden. Accordingly, the presumption of validity given to the zoning ordinance remains intact.

The same analysis is applicable to the defendants' argument that the zoning scheme at issue denies them equal protection and due process rights. Defendants argue that the "zoning scheme is much more burdensome on them than the majority of the rest of the zoning scheme is on similarly-situated businesses and providers of services." Defendants' Bill of Particulars, f 3. Defendants also failed to meet their burden on this issue.

The classifications of the relevant zoning scheme are not inherently suspect and, as discussed above, do not infringe upon the exercise of a fundamental right. Accordingly, the classifications at issue are "permissible if the governmental objective is legitimate and the classifications bear a reasonable or substantial relation thereto." *Estes Funeral Home* v. *Adkins*, 266 Va. 297, 304, 586 S.E.2d 162, 165 (2003) (internal quotations and citations omitted). The classifications carry with them the same presumptions and burdens as an ordinance itself

and are presumed to be valid. *Id.* at 304, 586 S.E.2d at 165-55.

Accordingly, defendants must produce probative evidence that the classification of which they complain is discriminatory and not rationally related to a legitimate government purpose. *Board of Supervisors v. Rowe*, 216 Va. 128, 135, 216 S.E.2d 199, 206 (1975). As discussed above, however, defendants offered little more than their opinion that there can be no legitimate government interest for limiting tattoo parlors and permanent makeup establishments to industrial areas. Moreover, defendants have not shown that the zoning scheme treats similarly-situated businesses differently. The zoning scheme does not allow any business supplying tattoos or permanent makeup to operate outside of an industrial district.

Defendants' arguments that the City is selectively enforcing the subject zoning scheme, ignoring other similarly-situated businesses that are operating in violation of the zoning ordinances, does not save their equal protection claim. Defendants' contention on this point is that defendants have been singled out and given an undue amount of attention, and that selective enforcement violates both equal protection and due process rights. The most evidence that defendants presented at trial on this issue established that another business operates within the City of Chesapeake that applies permanent makeup, and, although known to the City, it has not sought to bring an action against her such as with defendants here.

To succeed on a selective-prosecution claim, the defendants must "demonstrate that the prosecutor's decision 'was based on an unconstitutional motive.'" *Boyd v. County of Henrico*, 42 Va. App. 495, 522, 592 S.E.2d 768, 781 (2004) (citing *Rowsey v. Lee*, 327 F.3d 335, 343 (4th Cir. 2003)). The prosecution must be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, 'including the exercise of protected statutory and constitutional rights." *Id.* (citation omitted). Defendants have not supplied any evidence that the "undue attention" they claim they have received from the City has been deliberately based on an unjustifiable standard. Accordingly, to the extent that defendants argue that the City has selectively enforced the extant zoning scheme, their argument fails.

## CONCLUSION

For the foregoing reasons, the Court will grant the plaintiffs' motion to strike the defendants' evidence. Additionally, the Court finds that defendants are in violation of section 7-602 of the Chesapeake Zoning Ordinance, and the City's prayer for an injunction permanently enjoining the defendants from providing permanent makeup services at 445 Battlefield Boulevard, Suite Q, Chesapeake, Virginia, 23320 should be granted. The Office of the City Attorney is hereby directed to draft an order in accordance with this Memorandum Opinion and circulate it for counsel's endorsements.

The Clerk is hereby directed to send a certified copy of this Memorandum Opinion to all counsel of record.

Entered: [March 23, 2006]

/s/
Circuit Court Judge

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Friday *the* 19th *day of* January, 2007.

Lasting Beauty, L.L.C., et al., Appellants,

against Record No. 061586
Circuit Court No. CH04-626

City of Chesapeake, et al., Appellees.

[Entered: January 19, 2007]

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 25th day of October, 2006 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court

Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

THE CITY OF CHESAPEAKE,
A Municipal Corporation,

and

JAMES T. DAVIS, CZA,
Zoning Administrator,

Plaintiffs,

v. IN CHANCERY NO.: CH04-626

LASTING BEAUTY, L.L.C.

and

DENISE HUMPHRIES,

Defendants.

**JUDGMENT AND FINAL ORDER**

In accordance with the Court's memorandum opinion dated March 23, 2006, the Court grants the Plaintiffs' motion to strike the Defendants' evidence introduced in support of the Defendants' Cross Bill and will grant the Plaintiffs' prayer for a permanent injunction. Therefore, the Court ORDERS that the Defendants' Cross Bill is dismissed and ORDERS that the Defendants are perpetually enjoined from providing permanent makeup services at 445 Battlefield Boulevard, Suite Q, Chesapeake, Virginia 23320. However, by agreement, the injunction granted herein is stayed pending exhaustion of Defendants' appeal rights.

Entered: [May 3, 2006]

/s/
Circuit Court Judge

ASKED FOR REGARDING THE RULING RESULT, AND OBJECTED TO REGARDING THE COURT'S DETERMINATION THAT NO EVIDENCE WAS OFFERED AT TRIAL OF THE REASONABLENESS OF THE ORDINANCE REGULATING THE LOCATION OF TATTOO PARLORS. EVIDENCE WAS OFFERED AND ACCEPTED BY THE COURT THAT 501.97 ACRES IN THE GREENBRIER AREA AND OVER 3,500 ACRES IN THE ENTIRE CITY ARE ZONED FOR THE OPERATION OF A TATTOO PARLOR. THIS EVIDENCE CONSTITUTES REASONABLENESS UNDER THE "FAIRLY DEBATABLE" STANDARD.

/s/
Grady A. Palmer, Esq.
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Counsel for City of Chesapeake,
James T. Davis, CZA, Zoning Administrator

SEEN AND OBJECTED TO IN ACCORDANCE WITH MATERIALS FILED WITH THE COURT, EVIDENCE PRESENTED, AND ARGUMENTS MADE ON THE RECORD. ALSO OBJECTED TO ON THESE GROUNDS: 1) THE TRIAL COURT ERRED IN FINDING THAT HUMPHRIES MADE

ANY SORT OF MEANINGFUL ADMISSION RELATING TO THE ARGUMENT THAT THE ZONING SCHEME OPERATES AS A DE FACTO OR QUASI-BAN; 2) THE TRIAL COURT ERRED IN ITS INTERPRETATION OF DEFENDANTS' DILLON RULE ARGUMENTS AND EVIDENCE; 3) THE TRIAL COURT ERRED BY REJECTING DEFENDANTS' UNREBUTTED EVIDENCE AND APPLYING THE WRONG LEGAL STANDARD ON A MOTION TO STRIKE.

/s/

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